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Supreme Court, U.S.
FILED

001440 MAR 16 2001

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES COURT
March 2001

RODNEY F. WRIGHT,
Plaintiff-Appellant,
Vs.
OREGON, CHAIR
BOARD OF PAROLE,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

1. Is the ruling by the Ninth Circuit, affirming the decision by the District Court for the District of Oregon, in violation of petitioner's rights to petition the government, due process, the Writ of Habeas Corpus, equal protection of the law under the 1st, 5th, 6th, 14th Amendments and Article 1, Section 9, Clause 2, of the U.S. Constitution?

List of Parties

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Rodney F. Wright, pro se plaintiff, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit in this case.

OPINIONS BELOW

Nature of the Proceedings

This is an appeal from an order in Case No. 00-35574 entered on December 28, 2000 by Judge Hawkins and Tallman, Circuit Judges for the U. S. Court of Appeals for the Ninth Circuit. The relief sought is reversal of the Order and remand to the Ninth Circuit of Appeals for further proceedings.

Nature of the Judgment

In the United States Court of Appeals for the Ninth Circuit, an order affirming a decision in Case DC# CV-00-00238-JPC from the U. S. District Court for the District of Oregon. The opinion of the Court of Appeals is reported in Case No. 00-35574.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Effective Dates

The Opinion was entered on December 28, 2000. The petition for Certiorari was served and filed on March 11, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment, United States Constitution, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

2. The Fifth Amendment, United States Constitution, which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. The Sixth Amendment, United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4.The Fourteenth Amendment, United States Constitution, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Article 1, Section 9, Clause 2, United States Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

6. 28 U.S.C. § 2244 Finality of determination reads as follows:

(a) "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

7. Section 101 of AEDPA amended 28 U.S.C. § 2244 by adding following provision:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date of which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

8. 28 U.S.C. § 2253 states the following;

a. In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held

b. There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

c. Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing requirement by paragraph (2)."

9. The statute under which petitioner sought post-conviction relief is 28 U.S.C. § 2254. *State custody; remedies in Federal* courts which provides as follows;

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State Corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or that the applicant was otherwise denied due process of law in the State court proceeding; or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason, is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written in *dici* showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the Section 2254 case now before this Court.

On 2/16/2000, Petitioner filed federal writ of habeas corpus in civil case no. 00-238-CO.

On 4/6/2000, the Magistrate Judge entered Findings and Recommendation in civil case no. 00-238-CO.

On 4/13/2000 and 4/19/2000, Petitioner filed Objection to Magistrate's Findings and Recommendation and Addendum in civil case no. 00-238-CO.

On 5/3/2000, the District Judge adopted the Magistrate's Findings and Recommendation.

On 5/12/2000, Petitioner filed Notice of Appeal to the Ninth Circuit in civil case no. 00-238-CO.

On 5/25/2000, the District Judge issued Certificate of Non-Appealability in civil case no. 00-238-CO.

On 12/28/2000, the U. S. Court of Appeals for the Ninth Circuit filed an order in case no. 00-35574 affirming the denial of certificate of appealability.

B. Relevant facts concerning the underlying federal habeas corpus proceeding.

On 7/21/97, Petitioner filed a federal writ of habeas corpus pursuant to 28 U.S.C. 2254 challenging the fact of his convictions and sentences in

On 4/12/99, District Judge Opinion and Order dismissed the federal writ of habeas corpus in *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999).

On 4/27/99, Petitioner filed notice of appeal to the Ninth Circuit in *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999).

On 5/3/99, District Judge filed denial of certificate of appealability.

On 6/18/99, the U.S. Court of Appeals for the Ninth Circuit filed an order, in *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999), affirming the denial of "Certificate of appealability."

On 9/3/99, Petitioner filed a writ of certiorari to the U.S. Supreme Court.

On 11/1/99, the United States Supreme Court denied the writ of certiorari in *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999).

On 12/13/99, Petitioner filed a motion for leave to file out-of-time and petition for rehearing denying certiorari.

On 1/10/2000, the United States Supreme Court granted petitioner's motion for leave to proceed in forma pauperis, but denied petition for rehearing.

REASON FOR GRANTING THE WRIT

Review Is Warranted Because The Administrative Dismissal Of Petitioner's Federal Habeas Corpus Petition By The Ninth Circuit, Without Adjudication Upon The Merits, Affirming the District Court's Decision, Is In Violation Of Petitioner's Right For The Redress Of Grievances, Due Process, Habeas Corpus, And Equal Protection Under The First, Fifth, Sixth, And Fourteenth Amendments And Article 1, Section 9, Clause 2, Of The U.S. Constitution

As a citizen of the United States, petitioner contends that the dismissal of his Habeas Corpus petition is a miscarriage of justice. Petitioner believes that the slow erosion of his "inalienable" rights, as to the redress of grievances, due process, Habeas Corpus, and equal protection guarantees under First, Fifth, Sixth, Fourteenth Amendments and Article 1, Section 9, Clause 2, of the U.S. Constitution is inexcusable.

The Writ of Habeas Corpus has been described as "The Most Sacred Right" and "The Great Writ." It is arguably the cornerstone of Western government and personal liberty.

According to Black's Law Dictionary, the purpose of the Writ "is not to determine a prisoner's guilt or innocence, [but only] whether the prisoner is restrained of his liberty by due process." Its sole function is, "to release from unlawful imprisonment."

The Writ of Habeas Corpus applies primarily to persons held in custody by the government. In ancient times and today, the Writ is designed to prevent government from unlawfully and indefinitely incarcerating innocent persons and isolating them in circumstances from which they cannot possibly escape.

Under Common Law criminal jurisdiction, we all have the "Rights" and "Protections" we need and there must be an injured party. That is our Constitutional guarantee of the "injured party." Article 1, Section 9, Clause 2, of the United States Constitution declares this fact: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

The 6th Amendment "Protects" us (and makes available upon our demand) the "Right" by law, to have the "habeas corpus" process (to produce the victim or the injured person) enforced by law for our "Protection."

In Article 6, Clause 2, of our Constitution, the Constitution clearly states, "...this Constitution shall be the supreme law of the land." The First Amendment states that we have the right, "...to petition the Government for a redress of grievances..." with its origins in the Magna Carta and the development of the English parliamentary system..

The First Amendment of the Constitution states the following:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

As it now stands, Congress, under 28 U.S.C. § 2253(c)(2) and 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d), is restricting petitioner's constitutional right to petition the government. Petitioner has received judicial notifications from the District and Appellate courts, respectively, stating, "The request for a certificate of appealability is denied." Petitioner contends that he is exercising a right bestowed to him as a United States citizen under the First Amendment and Article 1, Section 9, of the U.S. Constitution.

Therefore, any judicial, legislative or administrative notifications, like a certificate of probable cause or appealability, which demotes petitioner's Constitutional rights to an arbitrary privilege, is clearly grievous infringement.

To support this conclusion, petitioner's initial federal habeas corpus petition was dismissed at the District, Appellate levels without the merits being adjudicated upon based upon the 1-year time limitation of the AEDPA. *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999)

In *Calderon v. U.S. District Court for Central District of Cal.*, Located in 112 Federal Reporter, 3d Series, the following concerning the Anti-Terrorism and Effective Death Penalty Act (AEDPA) legislative history is stated:

> "Neither the conference report, *see* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted* in 1996 U.S.C. C.A.N. 944, nor any statements of individual House or Senate members, describes the one year limitation as a restriction on federal court jurisdiction.
>
> Many members of Congress, including AEDPA's authors in the Senate and its sponsors in the House, did, however, describe section 101 as a "Statute of Limitations." *See, e.g.*, 142 Cong.Rec.S3472 (daily ed. Apr. 17, 1996)(statement of Sen. Specter)(AEDPA designed to "impose a statute of limitations on the filing of habeas corpus petitions."); 141 Cong.Rec.S7805 (daily ed. June 7, 1995) (statement of Sen. Hatch)("..Under current law, there is no "statute of limitations" on filing habeas petitions...) 142 Cong.Rec.H3606 (daily ed. Apr. 18, 1996)(statement of Rep. Hyde)("Now, we have a 1-year statute of limitations in habeas."); 141 Cong.Rec.S7838 (daily ed. June 7, 1995)(statement of Sen. Cohen) ("I support a statute for filing habeas petitions."); *id* at S7840, (statement of Sen. Biden) ("I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations and a strict limit on successive petitions.)"

Before the AEDPA enactment, state prisoners, had almost unfettered discretion in deciding when to file a federal habeas petition. The only pre-AEDPA time limit on filing habeas petitions was imposed by Rule 9 (a) of the Rules Governing Section 2254 cases in the United States District Court. Even delays of more than a decade did not necessarily bar a petitioner from seeking relief *Loncar v. Thomas,* 116 S.Ct. 1293, 1295, 134 L.Ed.2d 440 (1996).

Therefore, petitioner must now contend that section 101 of AEDPA amended 28 U.S.C. § 2244 (d)(1) stating, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." has suspended petitioner's federal Writ of Habeas Corpus. W*right v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999)

Black's Fifth Edition law dictionary defines the term "Statute of Limitation."

> "A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such

legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute."

Furthermore, based upon petitioner being directed to proceed to the Ninth Circuit's three-judge panel for a certificate of appealability pursuant to 28 U.S.C. § 2244(b)(3), petitioner must also argue against any conditions or terms implemented against exercising his right to petition the government as guaranteed under the First Amendment of the United States Constitution.

Since, petitioner is unable to make a determination as to the legislative intent of 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d), petitioner can only conclude that the application of these Congressional enactments infringes upon his First Amendment Constitutional right and the Writ of Habeas Corpus.

The Fourteenth Amendment of the Constitution is not merely confined to the protection of U. S. citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." These provisions seem to be universal in their application, to all persons, within the territorial jurisdiction of the United States of America.

Since the conclusion of petitioner's initial federal writ of habeas corpus, *Wright v. Oregon State Bd. Of Parole (Mem.)* U.S. (1999), the following actions by government officials have occurred. Therefore, petitioner requests the Court's indulgence as he uses his own situation as an example of the constitutional injustice and discrimination provided through the judicial application of 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d).

Petitioner waited six months beyond his maximum expiration date for the Oregon Board of Parole and Post-Prison Supervision to correct the sentencing discrepancy. As a consequence of this inaction, petitioner was reluctant to report in on parole. On February 15, 1999, a notice of suspension of treatment was mailed to petitioner for refusing compelled sex offender treatment. On August 26, 1999, the local newspaper, the Oregonian, published an article from the Oregon Board of Parole depicting petitioner as being a "dangerous fugitive."

Petitioner, acting in a timely fashion, voluntarily surrendered, and was detained for thirty days (30) at the Multnomah County Justice Center. While incarcerated there, petitioner was alerted to an unknown and unpublished Board action. (See Appendix I) Closer observation of the aforementioned document, petitioner noticed changes in the sentencing sequence, the addition of

thirty-six months of post-prison supervision and blank spaces beside "Special Conditions added," deleted and modified entry spaces.

Based upon Appendix I, the Chairperson of the Oregon Board of Parole, and one of his officers, signed an order that extended petitioner's parole and/or post-prison supervision, indefinitely. Additionally, petitioner refused to sign any document that extended his supervision beyond his sentence expiration date of July 28, 1998. However, it did not matter

Petitioner was released after thirty days of detention without formal explanation of petitioner's detention or release status. Petitioner has filed numerous requests with the Oregon Board of Parole and Post-Prison Supervision and their agents. To date, petitioner still has not received any formal release documentation.

Therefore, based upon the lack of any documentation from the Oregon Board of Parole and Post-Prison Supervision, petitioner remains fearful of being classified as a fugitive again. Petitioner questions the motivation by the Chairperson of the Oregon Board of Parole to extend petitioner's parole indefinitely. Involuntary civil commitment is clearly a "massive curtailment of liberty." *Vitek v. Jones,* 445 U.S., 480 491, 100 S.Ct., 1254, 1263, 63 L.Ed.2d 552 (1980)

Petitioner contends that statutes, similar to Oregon Revised Statutes, i.e.144.625-144.639 and 181.585-181.606, severely punishing "certain persons" upon release, based on the nature of their charges, are void on their face, as being within the prohibitions of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)

Petitioner also contends that the laws, rules and statutes, similar to Oregon Revised Statutes, i.e. 144.625-144.639 and 181.585-181.606, are void by reason of their administrative applications being unequal, arbitrary and capricious, so as to punish "certain persons", for what is permissible for others, without any distinction of circumstances. This unjust and illegal discrimination, though not made expressly, is made possible by such statutes. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)

If the terms and conditions for a second and successive Writ of Habeas Corpus petition are maintained constitutionally valid, pursuant to 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d), then, questionable actions by government officials will continue to go unabated. (See Appendix I.) Petitioner contends that the terms and conditions for a second and successive writ of habeas corpus petitions are constitutionally invalid, pursuant to the First, Fifth, Sixth, Fourteenth and Article 1, Section 9, Clause 2, of the United States Constitution. The abolishment of these statutes, 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d), must be immediate and the denied adjudication of petitioner's federal habeas corpus be heard.

Based upon the judicial application of 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d), petitioner can only conclude that the intent of the aforementioned Congressional enactments has and will continue to condone the infringement upon petitioner's Fifth and Fourteenth Amendment rights to due process and equal protection under the law, as well as petitioner's First Amendment Constitutional right.

"There should be no arbitrary deprivation of Life and Liberty..." *Barbour vs. Connolly*, 113 U.S. 27

"The courts are not bound by mere form, nor are they to be misled by mere pretenses. They are at liberty -- indeed, they are under a solemn duty -- to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purported to have been enacted those to protect... the public safety, has no real or substantial relation to those objects or is a palpable invasion of Rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mulger vs. Kansas*, 123 U.S. 623 661

"It is the duty of the courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachment thereon." *Boyd vs. United States*, 116 U.S. 616

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda vs. Arizona*, 384 U.S. 436, 491

Therefore, petitioner must strongly argue against being denied the "rights" and "protections" guaranteed by the U.S. Constitution under the First, Fifth, Sixth, Fourteenth Amendment and Article 1, Section 9, Clause 2 by 28 U.S.C. § 2253(c)(2), 28 U.S.C. § 2244(b) and 28 U.S.C. § 2244(d).

Furthermore, petitioner needs no permission, whether from an administrative, legislative, or judicial body, to act in accordance with his First Fifth, Sixth, Fourteenth Amendment and Article 1, Section 9, Clause 2, under the United States Constitution.

Conclusion

In conclusion, petitioner contends that the lower courts administrative dismissal of petitioner's writ, without the proper judicial adjudication upon the merits, violates petitioner's constitutional right to petition the government, due process and equal protection guarantees under the First, Fifth, Sixth, Fourteenth Amendments and Article 1, Section 9, Clause 2, of the United States Constitution.

This petition for writ of certiorari should therefore be granted.

Respectfully submitted under the penalty of perjury.

Dated this 1st day of March 2001.

Rodney F. Wright

Rodney F. Wright
Pro se
P.O. Box 20891
Portland, Or. 97294-0891

APPENDIX A

FILE STAMPED
DISTRICT COURT OF OREGON

April 6, 2000
at Medford
by D.N.
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CIVIL NO. 00-238-CO
RODNEY F. WRIGHT,
PETITIONER,
v.
CHAIR, OREGON BOARD
OF PAROLE,
RESPONDENT.
FINDINGS AND RECOMMENDATION

Cooney, Magistrate Judge.

Petitioner filed a petition under 28 U.S.C. § 2254 challenging a number of 1990 convictions and sentences for sexual offenses.

I take judicial notice that the convictions and sentences challenged in this proceeding were also the subject of a petition for habeas corpus relief in Civil Case Number 97-1098-HU. That case was dismissed by the District Court and a certificate of appealability was denied by the District Court and the Ninth Circuit of Appeals.

Pursuant to the AEDPA, a habeas petitioner may not file a second or successive petition in the District Court without first obtaining prior permission from a three-judge panel of the Court of Appeals. See, 28 U.S.C. § 2254(b).

Petitioner has not alleged or demonstrated that he has received such approval. Accordingly, petitioner's petition should be denied without prejudice to refile at such time, if any, that such approval is obtained.

This proceeding should be dismissed.

Date this 6th day of April 2000.

/s/John P. Cooney
John P. Cooney
United States Magistrate Judge

APPENDIX B

FILE STAMPED
DISTRICT COURT OF OREGON

May 3, 2000
at Eugene
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CIVIL NO. 00-238-CO
RODNEY F. WRIGHT,
PETITIONER,
v.
CHAIR, OREGON BOARD
OF PAROLE,
RESPONDENT.
ORDER

Magistrate Judge John P. Cooney filed Findings and Recommendation on April 6, 2000, in the above-entitled case.

The matter in now before me pursuant to 28 U.S.C. subsection 636(b)(1)(B) and Fed. R. Civ. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Petitioner has timely filed objections. I have, therefore, given de novo review of Magistrate Judge Cooney's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge's Cooney's Findings and Recommendation filed April 6, 2000, in its entirety.

Petitioner's petition is denied without prejudice to refile at such time, if any, that approval from a three-judge panel of the Court of Appeals, see 28 U.S.C. § 2254 (b), is obtained. This proceeding is dismissed.

IT IS SO ORDERED.

Dated this 2nd day of May 2000.

/s/Michael R. Hogan
United States District Judge

APPENDIX C

FILE STAMPED
DISTRICT COURT OF OREGON

May 25, 2000
At Eugene
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CIVIL NO. 00-238-CO
RODNEY F. WRIGHT,
PETITIONER,
v.
CHAIR, OREGON BOARD
OF PAROLE,
RESPONDENT.

DENIAL OF CERTIFICATE OF APPEALABILITY

Pursuant to petitioner's filing of a notice of appeal in this case, the court certifies that the petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2).

This cause is not appropriate for appellate review.

Dated this 25th day of May 2000.

/s/Michael R. Hogan
Michael R. Hogan
United States District Judge

APPENDIX D

FILE STAMPED
U.S. COURT OF APPEALS

December 28, 2000
Cathy A. Catterson,
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-35574
DC#CV-00-00238-JPC
OREGON (MEDFORD)
RODNEY FRANCIS WRIGHT,
PETITIONER-APPELLANT,
v.
OREGON STATE BOARD ,
RESPONDENT-APPELLEE.
ORDER

Before: HAWKINS and TALLMAN, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253 (c)(2).

If petitioner wishes to file a second or successive 28 U.S.C. § 2254 petition in the district court, petitioner must first move this court for an order authorizing the district court to consider this petition. See 28 U.S.C. § 2244 (b)(3). If petitioner files an application in this court for the authorization order, petitioner must show that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244 (b)(2); see also 28 U.S.C. § 2244 (b)(3). The Clerk shall serve on petitioner with this order a copy of the unofficial form successive petition request.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

APPENDIX E

FILE STAMPED
DISTRICT COURT OF OREGON

February 25, 1999
at Portland
K.W.
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
AT PORTLAND
CIVIL NO. 97-1098-HU
RODNEY WRIGHT,
PETITIONER,
v.
CHAIR OF THE OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION.
RESPONDENT.
FINDING AND RECOMMENDATION

HUBEL, Magistrate Judge.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his second amended petition [attached to petitioner's motion for temporary restraining order (#10)], petitioner seeks to challenge the constitutionality of a 1990 conviction and sentence(s) on several charges.

Respondent moved to dismiss the second amended petition on the basis that it was not filed within the one-year limitation period prescribed by 28 U.S.C. § 2244. Motion to Dismiss (#24). In response, petitioner contended that he had a properly filed state petition for writ of habeas corpus pending until July 23, 1996, and as such, the limitations period was tolled, and did not run until July 23, 1997.[1] Objection to Motion to Dismiss (#25) p. 4.

28 U.S.C. § 2244(d)(2) provides that the "time during which a properly filed application for State Post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation" under 28 U.S.C. § 2244(d).

[1] Petitioner's original petition in this action was filed on July 21, 1997.

By Order (#20) entered August 13, 1998, the court held that is could not "ascertain whether petitioner's state petition for writ of habeas corpus, which was finally determined on July 23, 1996, was a 'properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim' such that t the time during which it was pending 'shall not be counted toward any period of limitation under this subsection.'" Order (#20) p. 2-3 (quoting 28 U.S.C. § 2244). The parties were requested to submit further evidence and argument on this issue.

Petitioner filed a Response to Court Order (#27) and a Motion for Summary Judgment (#31). Respondent filed a Response (#35) to the court order and to petitioner's motion for summary judgment and exhibits (#36) consisting of the pertinent documents from the state habeas corpus proceeding which petitioner claims tolled the limitations period applicable to his federal petition. Respondent contends that the state habeas action petitioner filed was not a "properly filed application... for collateral review." Response #35) p.2

Based on the entire record before the court, find as follows.

In his second amended petition, petitioner challenges the constitutionality of a number of 1990 Multnomah County convictions and sentences for sexual offenses. Petitioner alleges nineteen grounds for relief challenging the convictions and sentences. In addition, in Grounds Twenty and Twenty-one, petitioner alleges claims apparently pertaining to the conditions of his parole and post-prison supervision. See (Second) Amended Petition p. 5-6; Addendum to Amended Petition p. 4-9.

Petitioner's claim that he is "being denied the right to worship, congregate and or associate with those of like beliefs" and that the Oregon Board of Parole and Post-prison Supervision "routinely violates his due process rights by acting in a judicial fashion" are claims that relate to the execution of petitioner's sentence and are therefore properly brought under 28 U.S.C. § 2241. The limitations period prescribed by 28 U.S.C. §2244 does not, by its terms, apply to claims under 28 U.S.C. §2241. However, the § 2241 claims relating to the execution of petitioner's sentence are improperly joined to petitioner's §2254 claims challenging the fact of his convictions and sentences.

Even if Grounds Twenty and Twenty-one were properly part of the petition in this case, they should be dismissed for two other reasons.

Petitioner's state habeas proceeding did not contain any claims about the Parole Board. Respondent's Exhibit (#36) Exhibit 105. Therefore, there was no "properly filed application for ... other collateral review' with respect to Grounds Twenty and Twenty-one pending at any time after the effective date of the AEDPA. Thus, any applicable limitation period was not tolled as to those grounds.

In addition, petitioner's state proceedings did not involve any claims about the parole board. Thus, petitioner has procedurally defaulted as to those claims because he has not presented them to the state's highest court for review. See, Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).
Accordingly, petitioner's claims alleged in Grounds Twenty and Twenty-one should be denied without prejudice to bring such claims in a separate proceeding pursuant to 28 U.S.C. § 2241.

The remaining issue before the court is whether plaintiff's § 2254 claims are barred by the one-year statute of limitations on such claims prescribed by the provisions of the AEDPA. As discussed above and in the court's previous order, the determination of that issue hinges on the question of whether petitioner had a "properly filed application for State post-conviction or other collateral review" pending that would toll the limitations period.

Petitioner argues that his state habeas proceeding, ultimately concluded on July 23, 1996, constituted a state preceding that tolled the limitations period under § 2244(d). Respondent argues that "the state habeas case does not alter the argument that petitioner did not timely file his federal habeas proceeding." Response (#35) p. 1.

Oregon provides two avenues for review of alleged errors, including constitutional violations, in criminal proceedings. Kellotat v. Cupp, 719 F.2d 1027, 1030 (9th Cir. 1983). Most trial errors must be raised by direct appeal to the Oregon Court of Appeals. Id., citing Lerch v. Cupp, 9 Or. App. 508, 496 P.2d 379, rev. denied (1972); see also, State v. Montgomery, 294 Or. 417, 657 P.2d 668 (1983). For violations that occur after trial, or that require a further evidentiary hearing for their determination, Oregon provides a statutory remedy in its trial courts by way of the Oregon Post-Conviction Hearing Act. O.R.S. §§138.510 to 138.610 (1981). Alleged ineffective assistance of counsel is properly asserted as a post-conviction claim. Kellotat, supra, 719 F.2d at 1030.

A state habeas corpus proceeding is not a proper method to attack a criminal conviction. O.R.S. 34.330 (2) (persons not allowed to prosecute the writ include "persons imprisoned or restrained by virtue of the judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree"); see also, Billings v. Mass, 86 Or App 66, 738 P.2d 222 (1987) (state habeas not a substitute for direct appeal) and Mueller v. Benning, 314 Or 615, 841 P.2d 640 (1992) and Mora v. Mass, 120 Or App 173 (1993), *affirmed* 319 Or 570, 877 P2d 641 (1994) (state habeas not a substitute for post-conviction). A writ of habeas corpus is proper only when a petitioner asserts grounds other than the unlawfulness of a judgment, the proceedings upon which the judgment is based, or the appellate review thereof. O.R.S. 138.540(2).

In allowing the state's motion to dismiss petitioner's state proceeding, Umatilla County Circuit Court Judge Jack Olsen stated: "Okay. Well, with all due respect to your client, Toni, this is not habeas corpus, it is either direct appeal or post conviction relief, are his remedies, but not habeas. The motion to dismiss is allowed." Respondent's Exhibits (#36) Exhibit 109 p.5.

Based on all of the foregoing, I find that there was no "properly filed application for State post-conviction or other collateral review" pending on April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act.

Therefore, petitioner had until April 23, 1997 to file his federal habeas petition. Calderon v. Central District of California, 112 F.3d 386 (9th Cir. 1997) and Calderon v. Central District of California, 127 F.3d 782 (9th Cir. 1997).

Petitioner did not file the federal habeas petition in this proceeding until July 21, 1997. The petition is time barred and should be denied.

Based on all of the foregoing, respondent's Motion to Dismiss (#24) should be allowed. Petitioner's Motion for Summary Judgment (#31) should be denied. Petitioner's Second

Amended Petition should be denied with prejudice. Petitioner may bring the claims alleged in Grounds Twenty and Twenty-one in a petition under 28 U.S.C. § 2241. This proceeding should be dismissed.

SCHEDULING ORDER

The above Finding and Recommendation will be referred to a district judge for review. Objections to these Findings and Recommendations are waived unless written objections are filed according to the schedule below. 28 U.S.C. §§ 636(b)(1)(B) and (C); FRCP 72.

March 15, 1999: Due date for filing objections. If no objections are filed, the Findings and Recommendation will go under advisement on that date.

March 29, 1999:Due date for filing responses to objections. If objections are filed, the Findings and Recommendation will go under advisement on that date or when responses are filed, whichever is earlier.

ENTERED FOR THE COURT:

/s/Dennis James Hubel

United States Magistrate Judge

APPENDIX F

FILE STAMPED
DISTRICT COURT OF OREGON

April 12, 1999
at Portland
K. Wight
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
AT PORTLAND
CIVIL NO. 97-1098-HU
RODNEY WRIGHT,
PETITIONER,
v.
CHAIR, OREGON BOARD
OF PAROLE AND POST-PRISON
SUPERVISION,
RESPONDENT.
OPINION AND ORDER

Presently before the court is petitioner's objection to Magistrate Judge Hubel's Finding and Recommendation filed on February 25, 1999. The court, after conducting a de novo review of the Findings and Recommendation, the parties' pleadings, the relevant law, and the record herein[2], shall adopt the Findings and Recommendation and grant the respondent's motion to dismiss the second amended petition for habeas corpus.

---

[2] When a party objects to any portion of a magistrate judge's report, the district judge must make a de novo determination of that portion of the report. 28 U.S.C. §636(b)(1)(B); McDonnell Douglass Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert denied 445 U.S. 920 (1982). The district judge may receive further evidence, recommit the matter with instructions, or accept, reject, or modify the report, in whole or in part. Id

As detailed in the Findings and Recommendation, petitioner's conviction dates back to 1990. Under the statutes of limitations for filing federal habeas petitions provided by the Anti-Terrorism and Effective Death Penalty Act("AEDPA"), petitioner therefore had one year from enactment of the AEDPA to file his petition-that is, on or before April 23, 1997. 28 U.S.C. § 2244; Calderon v. Central District of Cal., 112 F.3d 386 (9th Cir.), overruled on other grounds, 127 F.3d 782 (9th Cir. 1997). The court's record reveals the petition was not filed until July 23, 1997. Thus, it was filed outside the time allotted by the Act.

Furthermore, it is irrelevant that plaintiff filed for habeas corpus in Oregon State Court, because such a petition is not a proper vehicle for challenging a conviction in Oregon. (See Findings and Recommendation at 5-7) Thus, the filing of the state habeas petition did not alter the date upon which the federal statute of limitation began to run. (Id.) Finally, as described in the Findings and Recommendations, grounds twenty and twenty-one of the petition allege claims pertaining to the conditions of petitioner's parole and post-prison supervision, which are not properly joined to a petition filed under 28 U.S.C.§ 2254. As these claims are not properly before the court, they shall be dismissed without prejudice to petitioner's reasserting them in a petition under 28 U.S.C. § 2241.

Therefore, it is hereby ordered:

1. The Magistrate Judge's Finding and Recommendation (doc.38) is adopted.
2. Respondent's motion to dismiss, (doc.24), is granted.
3. Petitioners' motion for summary judgment (doc.31) is granted.
4. The second amended petition for habeas corpus, (attached to doc. 10), is denied. Grounds twenty and twenty-one may be reasserted in a petition under 28 U.S.C. §2241.
5. Petitioner's objection, (doc.39), is denied.

ENTERED FOR THE COURT:
/s/ Ancer L. Haggerty
United States District Judge

APPENDIX G

FILE STAMPED
DISTRICT COURT OF OREGON

May 3, 1999
at Portland
T.L.G.
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CIVIL NO. 97-1098-HU
RODNEY F. WRIGHT,
PETITIONER/ APPELLANT,
v.
OREGON BOARD
OF PAROLE,
RESPONDENT/APPELLEE.

DENIAL OF CERTIFICATE OF APPEALABILITY

Pursuant to petitioner's filing of a notice of appeal in this case, the court certifies that the petitioner has not made a substantial showing of the denial of a constitutional right pursuant to U.S.C. § 2253(c) (2). This cause is not appropriate for appellate review.

Dated this 3rd day of May 1999.

/s/Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

APPENDIX H

FILE STAMPED
U.S. COURT OF APPEALS

JUNE 18, 1999
Cathy A. Catterson,
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 99-35477
DC#CV-97-01098-DJH
OREGON (PORTLAND)
RODNEY FRANCIS WRIGHT,
PETITIONER-APPELLANT,
v.
OREGON STATE BOARD
OF PAROLE,
RESPONDENT-APPELLEE.

ORDER

Before: RYMER and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253 (c)(2).

APPENDIX I

STATE OF OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISON ORDER TO CONTINUE/AMEND SUPERVISION CONDITIONS

Name: Rodney Francis Wright
SID #: 8054788
Office/Caseload: MTNO 3429
Board Action Date: 4/29/1998
Physical Release Date:
Sentence Expiration Date: 7/28/1998
PPS Expiration Date: 3/21/1999
ASR Date: 9/20/1997
TPD Date:

OT	OFFENSE	1C	CNTY CASE #
MX	SEX AB1		MULT 891136121
SG	SEX AB1		MULT 891136121

RCA $	PPS	PPS EXP DATE
3707		
0	36	3/21/1999

Board finds subject to be a predatory sex offender pursuant to ORS 181.585-587
The following Amendments to your supervision conditions are ordered on release:
Special Conditions Added:
Special Conditions Deleted:
Special Conditions Modified:
I have read, or have had read to me, and fully understand and acknowledge the amendment(s) to the Order of Supervision Conditions, and the regulations, and restrictions governing my supervision. The maximum sentence expiration date on this order may change due to sentence calculations by the Department of Corrections. Parole officer may modify the order to reflect correct date.
G-1

You may seek Administrative Review of this order by submitting a written request to the chairperson within 45 days from the mailing date of this order (OAR 255-80-005-015). You may obtain judicial review of this order by filing a petition for review in the Court of Appeals, State of Oregon Supreme Court Building, Salem, OR 97310, within 60 days of the administrative review response. Judicial Review is pursuant to the provisions of ORS 144.355 and ORS 183.482(8).

/s/Diane A. Rea	handwritten comment "Didn't want to sign"	
Chairperson	Offender	Date
	/s/L. Calderbank	6-15-98
	Witness	Date